SHARIA COURT OF APPEAL
ILORIN, KWARA STATE, NIGERIA.
CERTIFIED TRUE COPY
SIGN 02/09/2022

NAME: A. I. ALKAMEL
RANK: A.C.R.

IN THE SHARIA COURT OF APPEAL OF KWARA STATE
IN THE ILORIN JUDICIAL DIVISION
HOLDEN AT ILORIN

APPEA – 4533 – 1 C.T.C
02/09/22

WEDNESDAY 3RD AUGUST, 2022/6TH MUHARAM, 1444 A.H.

BEFORE THEIR LORDSHIPS:

MAS'UD ADEBAYO ONIYE	-	**PRESIDING KADI**
SARAFA OLAWALE HANNAFI	-	**HON. KADI**
ABDURRAHEEM AHMAD SAYI	-	**HON. KADI**

APPEAL NO: KWS/SCA/CV/AP/IL/14/2022

BETWEEN:

NIKE MOHAMMED
EVANG. (MRS.) OLABISI MOHAMMED **APPELLANTS**

AND

1. MAIMUNA MOHAMMED
2. INNA FATIMOH MOHAMMED
(who are the 2nd & 3d wives who survived Major Mohammed, suing for themselves and as mothers and guardians of)
3. ALMUSTAPHA MOHAMMED **RESPONDENTS**
4. ABUBAKAR MOHAMMED
5. SARAT MOHAMMED
6. SALAMOTU HASSAN

JUDGMENT: WRITTEN AND DELIVERED BY MAS'UD ADEBAYO ONIYE

The appellants have lodged the present appeal due to their displeasure with the decision of Upper Area Court 1, Ilorin (hereinafter referred to as the 'court below') presided over by Hon. Abdulganeey Mustapha (Sole Judge). By the compiled record of appeal, the ruling being appealed was delivered on 14th February, 2022 as against 17th March, 2022 stated in the notice of appeal, *albeit*, the inconsistence in the dates is of no serious moment before an Islamic law court, which looks out for substantial justice rather than mere technicality. The said decision of the court below could be found at pages 175 – 180 of the record.

The appellants erroneously but promptly filed a notice of appeal in the court below and thereafter saw to the compilation of the record of appeal. They however later sought and obtained the leave of this court to

regularize the appeal. Thus, *vide* the order of this court granted on 31st May, 2022 a competent notice of appeal containing three (3) grounds was re-filed on 2nd June, 2022.

The synoptic summary of the case before the court below is that the respondents herein, as the plaintiffs, issued a plaint on 8th October, 2020, initially against only the 1st appellant. The claim of the respondents was that, as the 1st born and Next of Kin (NOK) of late Major Muhammed Adeniyi (hereinafter referred to as "the deceased"), the 1st appellant received from the Military Pension Board and Army Headquarters about Twenty-three Million Naira (₦23,000,000.00) and another Thirteen Million Naira (₦13,000,000.00), all as the benefits and entitlements of the deceased, without giving other beneficiaries of the deceased (the respondents) their shares therefrom.

When the 2nd appellant got the wind of the case, she sought and was granted the leave to join as a party in the suit. Thereafter the two appellants, as defendants in the court below, jointly challenged the jurisdiction of the court below on the following grounds adumbrated in their notice of preliminary objection –

i. That the 2nd appellant and late Major Mohammed Adeniyi were married under the Marriage Act;
ii. That late Major Muhammed Adeniyi died as a Christian;
iii. That late Major Muhammed Adeniyi died intestate; consequently, his estate is inheritable by only the 2nd appellant and her children;
iv. That dispute as to succession and administration of late Major Muhammed Adeniyi's estate are to be governed by statute, namely – Administration of Estates Law of Kwara State;
v. That the court below is only empowered by the Area Court Law to preside over disputes as to succession and administration of the estates governed by customary law or Islamic law;
vi. That the court below thus lacks the jurisdiction to preside over succession and administration of estate govern by statute; and
vii. That a subsisting suit with the same parties, same issues and same subject matter is currently pending at the High Court of Kwara State with suit number KWS/2/2020, filed by the respondents.

The appellants attached some documents as exhibits to the 41 paragraphed affidavit in support of the preliminary objection, *namely* - Certificate of the marriage conducted under the Marriage Act between the deceased and the 2nd appellant on 31/10/1992; General Writ of Summons filed by the respondents in the High Court and defence processes filed by the Nigeria Army at the High Court purportedly indicating that the deceased had a marriage under the Act with the 2nd appellant.

In response thereto, the respondents filed a 26 paragraphed counter affidavit wherein there are depositions *inter alia* that after the marriage between the 2nd appellant and the deceased at the First Baptist Church, Jos, the deceased also got married under Islamic Law to other three wives.

It was also averred in the counter affidavit that the deceased was a devoted Muslim throughout his life time and he died as a Muslim and was buried as a Muslim. Thus, it was the contention of the respondents that the conduct of the deceased at the point of death, was being a devoted Muslim and that should determine the applicable law to the administration of his estate.

The court below in a considered ruling overruled the appellants and held that it has jurisdiction over the matter submitted by the respondents. It is therefore the aforesaid ruling that is the subject of the present appeal.

After briefs were settled and exchanged by the parties in this court, same were duly adopted by counsel on behalf of the respective parties on 29th June, 2022. In adumbration, ***Omoniyi Odeyemi Esq.*** leading ***O. K. Ajiboye Esq.*** for the appellants further submitted that in the case of ***Obusez V. Obusez*** (citation supplied) the Supreme Court held that a deceased who chose to contract a Marriage under the Act intended that the English law should govern his estate.

On the other hand, ***S. A. Shogo*** of counsel representing the respondents additionally referred to section 1(b) of the Administration of Estates Law of Kwara State, the provision he submitted exempts the application of that law to the estate of the deceased.

In the respective briefs before this court, each of the parties formulated three (3) issues for determination. The issues formulated by the appellants are –

i. *Whether the Upper Area Court was right in holding that "since the 2nd appellants and late Adeniyi Muhammed have lived apart before his death, the second appellant cannot be considered married to late Adeniyi Mohammed" having failed to consider that the parties married under the Act (The issue is tied to ground three);*

ii. *Whether the Upper Area Court jurisdiction covers matter under Matrimonial Causes Act and Administration of Estates Law of Kwara State (The issue is distilled from ground 3); and*

iii. *Whether the suit at the Upper Area Court was not abuse of court processes in view of pending suit before the High Court of Kwara State in suit KWS/2/2020 (The issue is distilled from ground two).*

On the part of the respondents, the following are the issues distilled –

i. *Whether the Upper Area Court was right that Islamic law should be the law to govern the succession to the estate of late Major Mohammed Adeniyi and not English law;*
ii. *Whether this current suit constitutes abuse of court process at all; and*
iii. *Whether the Upper Area Court Ilorin has jurisdiction to determine this suit.*

This court however is of the view that from the complaints in the grounds of appeal against the ruling being appealed, the issues calling for resolution are –

1. *Whether the court below was right when it held that it has jurisdiction to entertaining the suit before it because it is Islamic Law that governs the administration of the estate of late Major Muhammed Adeniyi; and*
2. *Whether the court below was right when it held that abuse of court process was not established against the suit before it.*

On issue one; it is the case of the appellants that there was no dispute that late Major Mohammed Adeniyi married to the 2nd appellant under the Marriage Act. A certificate (Exhibit "A") was attached to the affidavit in support of the preliminary objection, to buttress the fact of that marriage under the Act. The appellants equally stated that the respondents are not denying the fact that the deceased married the 2nd appellant under the Marriage Act at First Baptist Church, Jos.

It is the further submission of the appellants that marriage under the Marriage Act generally connotes the legal union of one man and one woman as couple. In other words, it is a monogamous marriage and the parties thereto are forbidden from entering any other marriage except the parties have divorced. The appellants posited that in the instant case, the 2nd appellant and late Major Mohammed Adeniyi were not divorced.

To the appellants, it was a conjecture or speculation that has no root or space whatsoever in law when the trial court held that late Major Mohammed Adeniyi and the 2nd appellant were no longer married, because, according to that court, there was an implied separation between them on account that the 2nd appellant was not living with the deceased in Kainji where he died.

The appellants reiterated that by virtue of section 33 of the Marriage Act, during the pendency of a marriage conducted in accordance with native

law and custom or a marriage conducted under the Marriage Act, none of the parties thereto can validly conduct another marriage under the Act.

The appellants further argued that by the clear provision of section 33(1) of the Marriage Act and regard being had to an existing marriage under the Act between late Major Mohammed Adeniyi and the 2nd appellant, it is very clear that the purported subsequent marriages between late Major Mohammed Adeniyi and the 1st and 2nd respondents were invalid.

That being the case, the appellants submitted that it follows that the 2nd appellant was in law, the only legal wife of the late Major Mohammed Adeniyi. The trial court, according to the appellants, therefore misconceived and misinterpreted the facts before it when he held that there was no marriage between the 2nd appellant and late Major Mohammed Adeniyi, more so, when the marriage certificate was placed before the trial court.

The appellants referred to these cases of: ***Peter Chike Mogbodu V. Willy Kanayo Mogbodu (2018) LPELR 43770 (CA); Mrs. Tamunomiteim Nola & Ors. V. Duboye Graham-Douglas & Anr. (2019) LPELR – 48285 (CA); Onwudinjoh V. Onwudinjoh (957-58) 11 ERNLR 1; Craig V. Craig (1964) LLR 96; Nwankpele V. Nwankpele (1973) 3 U.I.L.R 8;*** *and* ***Abisogun V. Abisogun (1972) 10 S.C 1***. They also referred to sections 34, 35 and 36 of Marriage Act and the legal maxim that says – ***"Ex turpi causa non Oritur action"***.

It is the case of the appellants that the matrimonial home of late Major Mohammed Adeniyi and the 2nd appellant was the Nigeria Army Barrack, Bauchi and the reason why late Major Mohammed Adeniyi was also living at Nigeria Army Barrack, Kainji was stated in the affidavit in support of the preliminary objection.

It is argued by the appellants that the marriage under the Act by the deceased was not dissolved as speculated by the trial court, but was still subsisting because the conditions under section 15(2)(a – h) of the Matrimonial Causes Act were not met, which include that one of the parties must have filed a petition before a competent court for the dissolution of the marriage and must satisfy the court that the marriage has broken down irretrievably.

Appellants referred to ***Miss. Nkiru Amobi V. Mrs. Grace Onzegwu & Ors. (2013) LPELR – 21863 (SC)*** on the fact that even where there was a decree *nisi* (though not the case herein) and one of the parties dies before it was made absolute, the marriage still subsists. The appellants

therefore concluded that in law, there was no evidence to back the trial court's inference that the deceased and the 2nd appellant were separated during his lifetime.

Though argue as issue two, it is the further contention of the appellants that there is no basis for the application of Islamic Law in the administration of the estate of the intestate late Major Mohammed Adeniyi since he had married under the Marriage Act and such marriage was not dissolved before he purportedly contracted other marriages. The administration of his property whether real or personal therefore should be administered under the Administration of Estates Law of Kwara State.

The appellants posited that where a person who is subject to customary or Islamic law went ahead to contract a marriage in accordance with the provisions of the Marriage Act, and such person dies intestate, the property of such intestate shall be distributed in accordance with the provisions of the Administration of Estates Law, notwithstanding any customary law to the contrary.

It is the submission of the appellants that by contracting the marriage under the Marriage Act, the deceased intended the succession to his estate to be governed by the statute and not under Customary Law or Islamic Law. Also, that the deceased having married under the Act, it is only his lawfully wedded wife under the Act and the children from that marriage that can administered his estate according to the Administration of Estates Law of Kwara State and not according to Islamic Law.

The appellants again contended that the 1st and 2nd respondents cannot lay claim to be wives of the deceased, because in the eyes of the law the deceased never married them, as he was in a subsisting statutory marriage until he died. That the trial court rather than evaluated the depositions in the affidavit in support of the preliminary objection, went ahead to speculate that because the deceased and the 2nd appellant lived separately, it amounts to dissolution of their statutory marriage. The said speculation was reached without any statutory provision and with disregard to the depositions of the appellants explaining the reason why the couple lived apart.

The appellants cited ***Olowu V. Olowu (1985) 3 NWLR (PT 13) 372 at 390, para C – D; Cole V. Cole (1898) NLR 15*** *and* ***AG. Federation V. Sode (1990) NWLR (PART 128) 500*** in support of the fact that Major Mohammed Adeniyi (the deceased) and the 2nd appellant having married under the Marriage Act, had changed their personal laws by choice, to the English Law. Also, on the authority of the *locus classicus* of ***Cole V. Cole***

(1898) NLR 15 and other *plethora* judicial authorities in Nigeria, the distribution of the estate of an intestate man or woman is governed by the English Law where the deceased intestate got married under the Act.

The appellants again argued that the law is that even if a couple married under native law and custom, once they embrace Christianity and subsequently marry under the Act, *vide* celebration of marriage in a statutorily recognized Church, the earlier traditional marriage automatically gives way for the later marriage under the Act. Thus, if the deceased had wanted Islamic Law to govern his estate, he would not have adopted the English Law as his personal law by marrying under the Act. ***Victoria Sarki V. Daniel Sarki & Ors. (2021) LPELR – 52659 (CA)*** referred and also ***Ewa Jamina Nebuwa V. Ozougwu Nebuwa Nnenna (2018) LPELR – 45097 (CA)***.

The appellants therefore urged the court to hold that it is English Law that is applicable to the Estate of late Adeniyi Mohammed as held by the Supreme Court in ***Obusez V. Obusez (2007) ALL FWLR part 374 p. 227*** that the succession of the estate of a person who married under the Marriage Act will be regulated by the provisions of the Administration of Estates Law notwithstanding any native law and custom of the deceased. Also cited are ***Motoh V. Motoh (2010) LCN/4160 (CA); Esther A. Osho V. Gabriel Phillips & Ors. (1972) All NWLR 279; Cole V. Akinyele (1960) FSC 84***.

Per contra, the respondents proffered argument under their issues one and three that the court below has sufficient jurisdiction to entertain their suit before it because the applicable law to the administration of the estate of the late Major Mohammed Adeniyi is Islamic Law; as the last conduct of the deceased during his life time was that of a Muslim. They referred among others to the depositions in the counter affidavit to the effect that the deceased was a devoted Muslim till his death, he answered the Muslim name: "Muhammed" throughout his life, his death was announced in Exhibit 3 by the Nigeria Army as a Muslim and his burial was conducted in Exhibit 2 in accordance with Islamic rites.

It is the respondents' argument that after the marriage between late Major Mohammed Adeniyi and the 2nd appellant at First Baptist Church, Jos, he subsequently conducted marriages with other three wives under the Islamic Law and the marriages were evidenced with certificates such as Exhibits 1 and 7.

The respondents further canvassed argument that the 2nd appellant was aware of the subsequent marriages between late Major Mohammed Adeniyi

and the other wives (including the 1st and 2nd respondents) but never took any action during the lifetime of her husband until after his death. The respondents posited that the 2nd appellant had waived her legal right, arguing that it is a principle of law that when a person abstains from doing something to enforce his legal rights which he/she was fully aware of being violated, he/she is deemed to have acquiesced in the violation and will diminish his chance to regain or enforce the said rights. The case of ***Kaachalla V. Bank (2000) FWLR (PT. 73) 1*** was referenced in this regard.

It is part of the argument before us by the respondents that the 2nd appellant was not living with Major Mohammed Adeniyi at Kainji Army Barrack as at the time of his death and would therefore not know the last conduct of the deceased at the point of death – the determinant factor to ascertain the applicable law to the Administration of his estate. The respondents submitted that it is the 2nd respondent who lived with the deceased in Kainji Army Barrack who knew clearly that at the point of death, her husband was a devoted Muslim, duly observing five daily Muslim prayers at the Barrack's Mosque Kainji.

The respondents' case is that notwithstanding the marriage of late Major Mohammed Adeniyi to the 2nd appellant under the Marriage Act, the subsequent conduct of late Major Mohammed Adeniyi by marrying other wives under Islamic Law shows clearly that he was a Muslim and as such the English Law will not be the applicable law to the administration of his estate, but Islamic law will be the appropriate applicable law. Thus to the respondents, the trial Upper Area Court was right to have come to that conclusion and prayed this court to dismiss the appeal.

On the reply brief, we wish to state out rightly, that the appellants' objection on the competence of the issue(s) distilled and argued by the respondents is a technicality that has no *scintilla* of place in this kind of court – being an Islamic Law court. If counsel to the appellants have taken little pain to at least be abreast with our rules, they would have known that their objection, to say the least, is not supported by the practice and procedure of this court. See generally Order 7 of Sharia Court of Appeal Rules, a subsidiary legislation under Cap. S4, Laws of Kwara State.

To that extent, the numerous judicial authorities cited thereon including; ***KLM Royal Dutch Airlines V. Aloma (2017) LPELR – 42588 (SC)***; ***Chami V. UBA PLC, (2010) LPELR – 841 (SC)***; ***Okonkwo V. Ezeaku & Anr. (2020) LPELR – 57008 (SC)***; ***Ebhogaiye & Ors. V. Enemigin & Anr. (2021) LPELR – 54784 (CA) (Pp. 10 para. B)***; are irrelevant

and inapplicable because they relate to formulation of issues under the Court of Appeal and Supreme Court Rules, and we so hold.

Notwithstanding how it has been crafted, in fact, a closer look at the respondents' issue one shows clearly that it relates to the main bone of contention in this preliminary objection: that is, which law is applicable to the estate of the deceased Major Muhammed Adeniyi? So, the appellants' reply argument and authorities cited thereto, after the frivolous objection, amounts to a second bite at the cherry which will enjoy no countenance by this court.

Be that as it may, the new points covered in the said reply brief include the submission that the subsequent marriages by the deceased to the 1st and 2nd respondents were illegal, null and void, and constituted an offence of bigamy under the Matrimonial Causes Act. Also, that a void marriage cannot be approbated by the conduct of the parties; the conduct which also cannot confer legality on illegality and that the said subsequent marriages are void *ab initio*, quoting Lord Denning in ***Macfoy V. UAC (1961) 3 WLR 405 at 1409*** and Per Georgewill JCA in ***NERC V. Adebiyi & Ors (2017) LPELR 42903 (CA)***.

The appellants further reply that it is not the law that because the 2nd appellant did not complain during the lifetime of her husband about the subsequent marriages, she had waived her right. That section 3(1) of the Matrimonial Causes Act never contemplated any waiver. Ditto that those subsequent marriages remain void by virtue of section 33(1) of the Marriage Act and section 3(1) of the Matrimonial Causes Act, notwithstanding that they were evidenced with marriage certificates, for something cannot come out of nothing (*exnihilonihil fit*) as held in ***Mrs. Ifeanyi Obiozor v. Baby Nnamua (2014) LPELR – 23041 (CA)***.

The foregoing represents a capsule review of the respective submissions of the parties on this *vex* issue of whether the trial court has jurisdiction to entertain the suit before it from the angle of the applicable law to the estate of the deceased Major Muhammed Adeniyi. It is noteworthy however, that the parties' arguments extensively touched on some core aspects of the merit of the suit before the court below. The court below was also cut in the same web of dwelling on the merit of the substantive case, instead of limiting itself to the preliminary objection.

On our part, we shall however try to limit ourselves strictly to issue of jurisdiction and refrain from delving into the merit while resolving it. The jurisdiction being questioned here is strictly on which law is applicable

Also worthy of note is the fact that the following facts are of common ground and not in dispute between the parties, namely –

i. that late Major Muhammed Adeniyi initially conducted a marriage under the Marriage Act with the 2nd appellant (the 1st wife) at the First Baptist Church, Jos (a licensed place of worship);
ii. that late Major Muhammed Adeniyi subsequently in accordance with Islamic Law married the 1st and 2nd respondents and even another woman (later divorced) as his 2nd, 3rd and 4th wives;
iii. that late Major Muhammed died intestate and was buried as a Muslim in accordance with Islamic faith; and
iv. that each of the above-mentioned marriages by late Major Muhammed Adeniyi was blessed with child(ren).

The court below being a sole Judge court (a court applying Islamic Personal Law), the gravamen of the challenge to its jurisdiction is that the applicable law to the estate of the deceased is not Customary Law or Islamic Law, but Statutory Provisions/English law, especially, the Administration of Estates Law of Kwara State.

The contention of the appellants essentially is that while the deceased chose to marry his 1st wife under the Marriage Act, he had voluntarily chosen the Statutory Provisions/English Law and not Islamic law as the law to regulate the administration of his estate after intestate death. On the other hand, the contention of the respondents is that it is the Islamic Law that regulates the estate of the deceased who was born, bred, died and buried as a Muslim and even subsequently after his marriage to the 2nd appellant under the Marriage Act, contracted other marriages under Islamic faith/Law.

The court below found in favour of the respondents' position that it has jurisdiction over the suit because Islamic Law should regulate the administration of estate of the deceased. The holding of the court below was hinged on its agreement that the deceased was born as a Muslim and his subsequent conduct before death which was in accordance to Islam, as well as the burial arrangements after his demise which were according to Islamic rites. See specifically page 178 of the record of appeal

Unarguably, the issue calling for resolution under this head involves conflict of laws, so to speak. While marriage under the Marriage Act is admittedly a monogamous union of a man and a woman for life and to the exclusion of all others, the Islamic Law lawfully permits a male Muslim, with capability, to marry more than one and not exceeding four wives. *Qur'an* chapter 4 verse 3 declares –

وإن خفتم ألا تقسطوا في اليتامى فانكحوا ما طاب لكم من النساء مثنى وثلاث ورباع فإن خفتم ألا تعدلوا فواحدةً أو ما ملكتْ أيمانُكم ذلك أدنى ألاّ تعولوا.

"And if you fear that you will not deal justly with the orphan girls then marry those that please you of (other) women, two or three or four. But if you fear that you will not be just, then marry only one or those your right hand possesses. That is more suitable that you may not incline to injustice."

In the resolution of this issue, our first port of call is the Administration of Estates Law which generally is the statutory provisions that govern the administration of property left behind by a person who died intestate (that is without leaving a will) or the undisposed property of a person who died testate (that is leaving a will).

The precursor to this law was the English Law of Administration of Estates which had given way to the Administration of Estates Laws of the various States. In Kwara State, the applicable law is Administration of Estates Law, Cap. A1, Laws of Kwara State (hereinafter referred to, for short, as "the law"). That law provides for how estate of deceased persons should be administered after his or her death. See the title of the Law.

However, the application of the law is specifically exempted on deceased persons whose estates are governed by Islamic Law. Section 1(1)(a) and (b) of the Law provides –

"(1) This Law shall not apply –

(a) to deaths occurring before its commencement unless otherwise provided; or

(b) to the estate of deceased persons, the administration of which is governed by Islamic Law." (underline supplied for emphasis)

The purport of the above exemption clause, no doubt, is that statutory provisions on administration of estate shall not apply to a person whose estate is governed by Islamic Law.

But as earlier found above, there is no dispute that the deceased in the case at hand, although died as a Muslim, got married to his 1st wife under the Marriage Act. It is also undisputed that he subsequently married to other women under Islamic Law. It is his marriage under the Act that the appellants claim has robbed the administration of his estate of the benefit of being governed by Islamic Law, which would have ordinarily applied. That argument takes us back to the same Law which exempted administration of estates governed by Islamic Law. Section 1(2) of the said Law provides –

"(2) The provisions of this Law relating to the administration of the estate of a person who died intestate or the undisposed part of the estate of a testator shall apply only to persons who contracted a valid monogamous marriage and are survived by a spouse or issue of such marriage:...."

What the above provision purports to say is that once a person chose to have a valid monogamous marriage under the Act, it is the Administration of Estates Law that will apply to his or her intestate estate or the undisposed part of his/her testate estate. So, it is a deceased or a testator that will in his life time, make a choice of which law should govern the administration of his/her estate.

It is therefore trite law that where of own volition a person opted for a monogamous marriage under the Marriage Act, the person had made a choice of the statute (Administration of Estates Law) to regulate the administration of his/her estate after death. But where of own volition a person married under Islamic Law, the estate of the person will be exempted from the application of the Administration of Estates Law and will be governed by the principles of Islamic Law.

Judicial authorities that fortify the above trite position of the law are legion and *plethora*. For example, in ***Obusez V. Obusez (2007) All FWLR (Pt. 374) 227 at 252*** per Onnoghen JSC (as he then was) held that –

"The deceased by contracting marriage under the Act opted out of the system of customary law of succession in case of intestacy."

Also in ***Nebuwa V. Nebuwa (2018) LPELR – 45097 (CA)*** it was held that –

"For by contracting a monogamous marriage under the Act, as correctly held by the trial Judge, the deceased is deemed to have intended the succession to his estate under the English Law and not under Customary Law. ***Cole V. Cole (1898) 1 FNLR p. 15*** *and* ***Obusez & Anr. V. Obusez & Anr. (2007) 10 NWLR (Pt. 1043)***"

Other authorities along the same line would include ***Cole V. Akinyele (1960) FSC 84***; ***Olowu V. Olowu (1985) 3 NWLR (Pt. 13) at 390***; ***Sarki V. Sarki & Ors. (2021) LPELR – 52659 (CA)***; ***Motoh V. Motoh (2010) LCM/4160 (CA)***; ***Osho V. Philips & Ors. (1972) All NLR 279*** and so many others.

Thus, the irresistible conclusion we have come to, based on the above espoused authorities, is that the estate of late Major Muhammed Adeniyi

would ordinarily have been governed by Islamic law if he had not by own choice contracted a valid and subsisting marriage under the Act with the 2nd appellant. Dissolution of a Marriage under the Act cannot be presumed, speculated or conjectured as erroneously done by the trial court.

Definitely, the conduct of a marriage under the Act (which is also Christian marriage) is an act that conflicts which the Islamic religion which the deceased professed. Certainly too, the subsequent Islamic conducts of the deceased including marrying other wives, dying and being buried as a Muslim *etc* could not, by the state of the Nigerian Law, legalize the illegality or change the law that should govern his intestate succession – his chosen Administration of Estates Law.

It is not the law that the 2nd appellant must complain or take out an action against the subsequent marriages. The conduct of subsequent marriage(s) is an infraction of the law (the Marriage Act) which takes ordinary effect. As argued by the appellant, no waiver or acquiescence is capable of relieving the infraction.

In the Book ***The Status of Registry and Islamic Law Marriages in Nigeria***: (2021) by S. A. Giwa, the learned author at page 70 states that –

> *"Where a Muslim man contracts a registry marriage as his first marriage under the Marriage Act and wishes to take a second wife for any reason or change his wife, he has to first divorce his first wife...."*

In law, the deceased by opting for the registry marriage has changed his "factory setting" religion of Islam and the only way he could legally unbundle himself and return back to the "factory setting" from the status he WILLINGLY put himself, is by legally repudiating the statutory marital relationship he had with the 2nd appellant, through a legal divorce.

In other words, the Administration of Estates Law would not have been the applicable to his estate and Islamic Law would have, had the deceased Major Muhammed Adeniyi taken legal steps in his life time to dissolve the statutory marriage he had with the 2nd appellant and a valid *decree nisi* of divorce had been made absolute. That is the only thing that can legally undo the choice of Administration of Estates Law voluntarily made by the deceased by the fact of his 1st marriage under the Act. See ***R V. Princewill (1963) All NLR 54***.

In that case, Princewill who was married under the Marriage Act of 1950 subsequently in 1960 changed his religion and became a Muslim. He then

purported to marry another wife under Islamic Law without dissolving his previous marriage contracted under the Marriage Act. The court held he was wrong. See also ***Oshodi V. Oshodi (1963) All NLR 647***.

At page 72 of S. A. Giwa *(supra)* the learned author stated the position correctly in our view thus –

> *"The Muslim man who has contracted the registry marriage is already against the laws of Islam as his property will not be shared in accordance with Sharia when he is deceased."*

Towing the same line of reasoning, the learned jurist and author, his lordship, M. A. Ambali (retired Grand Kadi) in his book: ***The Practice of Muslim Family Law in Nigeria***, 3rd Edition, page 389, under the heading: "The Legal Implication of Muslims Contracting Marriage Under the Marriage Act", says –

> *"Muslims who contract their marriage under the Marriage Act have unconsciously created some complications."*

It is therefore quite unfortunate that many Muslims, due to ignorance and for regrettable reasons, plunge their head into Marriage under the Act, also known as statutory marriage or registry/court marriage, thereby unconsciously creating such kind of problems like the present one.

Perhaps it may serve as useful digression and admonition to harp on some among others of the inherent implications of Muslims contracting statutory, court or registry marriage or marriage under the Act. Once contracted:

- such marriage does not permit of any other marriage (customary or Islamic) after it (in fact, it is bigamy to do so);
- such marriage is dissolvable only through court proceedings (first, by a decree *nisi* and then, decree absolute);
- such marriage is a marriage officiated in unislamic but Christian ways and most times by Christian clergies;
- such marriage offends Islamic, customary, Nigerian and African customs which allows polygamy; and above all,
- such marriage denies the right to have Islamic Law govern the administration of estate left after death by the couple.

Coming back to the present appeal, it is our firm considered view that the court below was in grave error to have held that Islamic Law governs the estate of late Major Muhammed Adeniyi who was still in a valid and subsisting marriage under the Marriage Act till his death. The applicable law to the administration of estate of the deceased is therefore the Administration of Estates Law of Kwara State and not Islamic Personal Law

over which the court below being a sole Judge Court applying Islamic Personal Law has jurisdiction.

We conclude this issue with *Qur'an* chapter 5 verse 8 that warns that –
....كونوا قوّامين لله شهداء بالقسط، ولا يجرمنكم شنآن قوم على ألا تعدلوا اعدلوا هو أقرب للتقوى....

> *"....Stand out firmly for Allaah and be just witnesses and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety...."*

Issue one is accordingly resolved in favour of the appellants.

The resolution of issue one in favour of the appellant is sufficient to allow the appeal and set aside the ruling of the trial court for lack of jurisdiction. However, for whatever its worth, issue two is a complaint that the suit at the court below is an abuse of the pending suit before the High Court in suit No. KWS/2/2020.

It has gone beyond moot point that a court faced with complaint of abuse of court process only needs to look at the processes before the two courts and see whether they relate to the same parties and same issues and claims.

The appellants quoted from the case of **Society *BIC S. A. & Ors. V. Charzin Industries Ltd. (2014) LPELR-22256 (SC)*** where the Supreme Court espoused on what amounts to multiplicity. The court held it to be a coexistence of two or more suits on the same subject matter, issues and parties. To buttress that point, the appellants attached *inter alia* exhibit D, which is the writ of summons containing the names of the parties and the claims in the suit before the High Court.

The appellants also posited that the respondents by their own showing in their processes before the court below, and by oath in an affidavit, stated that there is a pending case at the High Court of Kwara State with suit KWS/2/2020.

It is submitted that if the trial court had evaluated the processes placed before it rightly and the date of filing the two cases, it would not have come to the wrong conclusion that there was no abuse of court processes. They cited ***Onyeabuchi V. INEC (2002) FWLR Pt. 103 Pg. 453 @ 469*** that the suit in abuse of court process, like the case at hand, is liable to dismissal.

The simple answer of the respondents is that this current suit is never in anyway an abuse of any court processes, in that, the current suit and suit No. KWS/2/2020 in the High Court are two different suits with different parties and different claims, citing ***Awofeso V. Oyenuga (1996) 7 NWLR (Pt. 460) 360*** and referring to pages of the record of appeal that contain the processes filed in the two pending suits.

With the above positions of the parties, coupled with the availability of the civil summons and plaint with which the suit in the court below was ignited (pages 101 – 103 of the record) and the writ of summons of the case pending in the High Court (pages 36 – 38, 67 – 70 and 132 – 135 of the record), this court is indeed surprise, like the appellants, how the trial court has come to the conclusion in his ruling, at page 179 of the record, that the appellants did not tender any document to support their prayer for abuse of court process. We believe the court below had sufficient processes already before it to determine whether the suit before it is in abuse of the suit in the High Court.

Our observation is that the two suits have the same parties, though the suit in the High Court has more parties which include the father of the deceased (Mall. Adeniyi Hassan), the Nigeria Army, the Commanding Officer 22 Battalion of Nigeria Army and the Military Pension Board.

Except couched differently, the claims of the respondents herein, who are the plaintiffs both at the court below and in the suit pending at the High Court, are essentially over the estate of late Major Muhammed (Arogundade) Adeniyi which was allegedly collected by the 1st appellant herein (a defendant in the two suits) without given the others (respondents) their shares and a call on the two courts to ask the 1st appellant to render account, as well as for the two court to order the sharing of the deceased's estate in line with Islamic Law.

There are also more claims in the suit before the High Court than the claims before the court below; specifically there are additional claims against the above mentioned additional parties, such as, to declare the retirement and death benefit paid by them as invalid. Also by the endorsements, while the suit in the High Court was filed on 6th January, 2020 and is still pending, the suit in the court below was filed thereafter on 8th October, 2020.

We are therefore of the considered legal view that as per between the same parties and same claims that featured in the two suits (excluding the additional parties and claims), abuse of court process is discernible in the

suit before the court below leading to the present appeal. And in agreement with the authority of ***Onyeabuchi V. INEC (2002) FWLR (Pt. 103) 453 at 469*** and other litany of authorities, once a court is satisfied that the proceedings before it amounts to an abuse of process, it has the right, in fact a duty, to invoke its coercive powers to punish the party who is in abuse of process by striking out the action which constitutes the abuse.

Afortiori, the suit before the court below is found to be an abuse of the process of court and that has robbed the trial court of the jurisdictional competence to entertain same. This issue is equally resolved in favour of the appellants.

As earlier pointed out in this judgment, we have not decided the merit of the dispute between the parties. We only treated the issue whether the court below being an Islamic Personal law court has jurisdiction over the suit before it.

Premised on the resolution of the two issues, this appeal is accordingly allowed. The ruling of the court below delivered on 14th February, 2022 is hereby set aside and suit No. UAC 1/CVF/968/2020 before Upper Area Court No, 1, Ilorin is hereby struck out.

Appeal succeeds

A. A. Sayi
(Hon. Kadi)
03/08/2022

M. A. Oniye
(Presiding Kadi)
03/08/2022

(والله أعلم)

S. O. Hannafi
(Hon. Kadi)
03/08/2022

Counsel: *Omoniyi Odeyemi Esq. with Omotola Kuburah Ajiboye Esq. for the appellants. Sarafa A. Shogo Esq. for the respondents.*

SHARIA COURT OF APPEAL
ILORIN, KWARA STATE, NIGERIA
CERTIFIED TRUE COPY
SIGN.....
DATE.....02/09/2022

NAME: A.I. ALCANMI
RANK: A.C.R
C.T.C

AFFCA-4533-1
02/09/22

KWARA STATE INTERNAL REVENUE SERVICE

FENIX MOBILE

* MDA's COPY *

MDA: SHARIA COURT

LOCATION: SHARIA COURT/SHARIA COURT

TRN:-BBZJA-23124-AFFCA-4533-1

TERMINAL ID:	913423506123124
DATE:	Sep 02 2022
TIME:	4:00 PM
METHOD:	VAULT
AGENT:	MIFTAU -AFFCA
CONVENIENCE FEE:	NGN 0.00

* SUCCESSFUL *

PAYMENT DETAILS

Court Fees (Oath Affidavit):
NGN 450.00

TOTAL AMOUNT: NGN 450.00

Remark: CERTIFIED TRUE COPY

TAXPAYER DETAILS

NAME:	NIKE MUHAMMED
TIN:	9999999999
PHONE:	-
EMAIL:	-

SCAN THE ABOVE TO
CONFIRM PAYMENT,
OR
VISIT FENIXRMS.com
PLAY YOUR PART, PAY YOUR TAX